



## 48 CFR Parts 615 and 652

[Public Notice: 11611]

RIN 1400-AE60

### Acquisition Regulation: Access to Contractor Records

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** The Department of State (the Department) is finalizing an amendment to the Department of State Acquisition Regulation (DOSAR), to add a new contract clause relating to Department requests for examination of contractor records.

**DATES:** This final rule is effective [*INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Tandra A. Jones, Senior Procurement, Email: [AcquisitionPolicy@state.gov](mailto:AcquisitionPolicy@state.gov)

**SUPPLEMENTARY INFORMATION:** On July 2, 2021, the Department published a notice of proposed rulemaking, proposing to add 48 CFR part 615, section 615.209-70, *Examination of Records*, and 48 CFR part 652, section 652.209-70, *Examination of Records*, to the Department of State Acquisition Regulation (DOSAR). 86 FR 35257. The Department provided 60 days for public comment. No comments were received. Accordingly, the Department is publishing this final rule.

#### *What is the Authority for this Rule?*

Title 41 of the U.S. Code, section 4706, provides that the head of an executive agency, acting through an authorized representative, may, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to 41 U.S.C. chapter 35 with respect to a contract or subcontract, examine all records of the contractor or subcontractor related to:

- the proposal for the contract or subcontract;
- the discussions conducted on the proposal;
- pricing of the contract or subcontract; or
- performance of the contract or subcontract.

The Federal Acquisition Regulation (FAR), 48 CFR 15.209(b), *Solicitation provisions and contract clauses*, states (in summary) that, when contracting by negotiation, except as provided in paragraph (b)(2) of § 15.209<sup>1</sup>, the contracting officer shall insert the clause at § 52.215-2, Audit and Records-Negotiation, in solicitations and contracts except those for

- Acquisitions not exceeding the simplified acquisition threshold;
- The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or
- The acquisition of commercial items exempted under § 15.403-1.

#### *Why is the Department Publishing This Rule?*

The DOSAR implements the FAR (and therefore, the statute, 41 U.S.C. 4706) for the Department of State.<sup>2</sup> The Department has determined, after a review of the existing regulations, that further clarity is required regarding implementation of 41 U.S.C. 4706 as it relates to contracts *other than* contracts by negotiation (which, as noted, are already covered by FAR § 15.209(b)).

For these reasons, the Department is adding § 615.209-70 to the DOSAR, requiring the contracting officer to insert a new clause, *Examination of Records* (proposed § 652.215-70), in all solicitations and contracts other than contracts by negotiation.

## **Regulatory Findings**

### *Administrative Procedure Act*

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<sup>1</sup> Paragraph (b)(2) relates to contracts using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

<sup>2</sup> 48 CFR 601.303.

In accordance with the provisions of the Administrative Procedure Act, the Department published this rulemaking as a proposed rule, and provided 60 days for public comment. This final rule will be effective 30 days after publication.

#### *Regulatory Flexibility Act*

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on small entities. This determination is based on the fact that this rulemaking clarifies within the DOSAR the authority of the Department to examine contractor records, which is already provided by statute.

#### *Congressional Review Act*

This rule is not a major rule as defined by 5 U.S.C. 804(2).

#### *Unfunded Mandates Act of 1995*

This will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

#### *Executive Orders 12866 and 13563*

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). E.O. 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders and finds that the benefits of this rule outweigh any costs, which the Department assesses to be minimal. As noted, this

rule does not impose any new requirements on contractors. The Office of Information and Regulatory Affairs has determined that this regulation is “not significant” under E.O. 12866.

#### *Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rulemaking will not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

#### *Executive Order 13175*

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

#### *Paperwork Reduction Act*

This rule does not add or revise any information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

### **List of Subjects in 48 CFR Parts 615 and 652**

Administrative practice and procedure, Government procurement.

Accordingly, the Department of State amends 48 CFR chapter 6 as follows:

### **PART 615—CONTRACTING BY NEGOTIATION**

1. The authority citation for part 615 continues to read as follows:

Authority: 22 U.S.C. 2651a, 40 U.S.C. 121(c) and 48 CFR chapter 1.

2. Section 615.209-70 is added to read as follows:

#### **615.209-70 Examination of records.**

The contracting officer shall insert the clause at 652.215-70, Examination of Records, in all solicitations and contracts other than those described in Federal Acquisition Regulation 15.209(b)(1).

**PART 652—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. The authority citation for part 652 continues to read as follows:

**Authority:** 22 U.S.C. 2651a, 40 U.S.C. 121(c) and 48 CFR chapter 1

4. Section 652.215-70 is added to read as follows:

**652.215-70 Examination of records.**

As prescribed in 615.209-70, insert the following clause.

**EXAMINATION OF RECORDS**

(a) With respect to matters related to this contract or a subcontract hereunder, the Department of State Office of the Inspector General, or an authorized representative, shall have upon request:

(1) Complete, prompt, and free access to all Contractor and Subcontractor files (in any format), documents, records, data, premises, and employees, except as limited by law; and

(2) The right to interview any current Contractor and Subcontractor personnel, individually and directly, with respect to such matters.

(b) This clause may not be construed to require the contractor or any subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(c) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (c), in all subcontracts under this contract other than acquisitions described in Federal Acquisition Regulation 15.209(b)(1).

(End of clause)

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